

James R. Condo (#005867)  
SNELL & WILMER L.L.P.  
One Arizona Center  
400 E. Van Buren  
Phoenix, AZ 85004-2204  
Telephone: (602) 382-6000  
jcondo@swlaw.com

Richard B. North, Jr. (admitted *pro hac vice*)  
Georgia Bar No. 545599  
Matthew B. Lerner (admitted *pro hac vice*)  
Georgia Bar No. 446986  
NELSON MULLINS RILEY & SCARBOROUGH LLP  
Atlantic Station  
201 17th Street, NW, Suite 1700  
Atlanta, GA 30363  
Telephone: (404) 322-6000  
[richard.north@nelsonmullins.com](mailto:richard.north@nelsonmullins.com)  
[matthew.lerner@nelsonmullins.com](mailto:matthew.lerner@nelsonmullins.com)

Attorneys for Defendants  
*C. R. Bard, Inc. and*  
*Bard Peripheral Vascular, Inc.*

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF ARIZONA**

IN RE: Bard IVC Filters Products Liability Litigation      MDL NO. 15-02641-PHX-DGC

## This Document Relates to:

JIMMY PHILLIPS,

Plaintiff,

Case No. 2:17-CV-01154-DGC

C. R. BARD, INC., a New Jersey Corporation; AND BARD PERIPHERAL VASCULAR INC., (a subsidiary and/or Division of Defendant C. R. BARD, INC.) an Arizona Corporation,

**MEMORANDUM OF LAW IN  
SUPPORT OF DEFENDANTS'  
MOTION TO DISMISS THE  
PLAINTIFF'S COMPLAINT**

## Defendants.

1                   **I. INTRODUCTION**

2                   The Court should dismiss the Complaint because it is a legal nullity. Plaintiff Jimmy  
 3 Phillips (the “plaintiff”) filed a lawsuit on April 18, 2017, against Defendants C. R. Bard, Inc.  
 4 and Bard Peripheral Vascular, Inc. (collectively, “Bard”) for personal injuries allegedly  
 5 sustained from a Bard Eclipse™ inferior vena cava filter (the “Filter”).<sup>1</sup> The style of the  
 6 Complaint identifies “Jimmy Phillips” as the plaintiff, and identifies no other plaintiff. At the  
 7 time the Complaint was filed, however, the plaintiff had been deceased for over four months.<sup>2</sup>  
 8 Because a deceased party cannot be party to a legal proceeding, the Complaint is void *ab*  
 9 *initio*.

10                  Bard notes at the outset that it contacted the plaintiff’s counsel in an effort to obtain  
 11 dismissal of this action without the Court’s involvement. To that end, Bard reached out to the  
 12 plaintiff’s counsel on May 20, 2019 in an effort to resolve this dispute without filing a formal  
 13 motion.<sup>3</sup> Ultimately, however, the plaintiff’s counsel did not respond to Bard, and this motion  
 14 follows.

15                   **II. FACTUAL BACKGROUND**

16                  The Complaint asserts claims against Bard for negligence, strict liability, breach of  
 17 warranty, negligent misrepresentation, fraudulent misrepresentation, fraudulent concealment,  
 18 and punitive damages in connection with injuries the plaintiff alleges resulted from the Filter.  
 19 (*See generally* Compl., Ex. A). The Filter was implanted at Saint Thomas West Hospital in  
 20 Nashville, Tennessee on or about August 16, 2010. (Ex. B, pp. 1-2, § 3). Subsequently, the  
 21 plaintiff claims that the filter tilted and embedded in the wall of his inferior vena cava  
 22 (“IVC”), with a strut perforating his IVC. (*Id.* at 2-5). The Filter was subsequently removed,  
 23 with another IVC filter being put in its place. (*Id.* at 3, § 5(C)).

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 27                  <sup>1</sup> ECF No. 1, Case 2:17-CV-01154 (D. Ariz). A copy of the Complaint is attached hereto as  
 28 Exhibit A.

2                  <sup>2</sup> See Exhibit B, Plaintiff Profile Form for Jimmy Phillips, p. 1, §2.

3                  <sup>3</sup> A copy of this correspondence is attached hereto as Exhibit C.

1       The Complaint was filed in the MDL on April 18, 2017 (Ex. A), but the plaintiff  
 2 passed away on December 2, 2016. (See Ex. B, PPF for Jimmy Phillips, p. 1, § 2.) As such,  
 3 the plaintiff had been dead for over four months before the Complaint was filed in the MDL.

4       **III. ANALYSIS**

5       The Court lacks jurisdiction to consider the Complaint because it is a legal nullity.  
 6 Accordingly, Bard respectfully requests that the Court dismiss this case pursuant to Federal  
 7 Rule of Civil Procedure 12(b).

8       “Only a real party in interest has the capacity to bring a lawsuit.” *In re: Bard IVC*  
 9 *Filters Prod. Liab. Litig.*, No. 2641, 2016 WL 3055112, at \*1 (D. Ariz. May 31, 2016),  
 10 *appeal dismissed* (July 15, 2016). “The capacity doctrine relates to the issue of a party’s  
 11 personal right to litigate in federal court” and presents a jurisdictional issue to the court. *Id.*  
 12 “[A] party must have a legal existence as a prerequisite to having the capacity to sue or be  
 13 sued.” *Adelsberger v. United States*, 58 Fed. Cl. 616, 618 (Fed. Cl. 2003) (“The question  
 14 presented is whether an action can be initiated in the name of a deceased person. We think the  
 15 answer is plainly, ‘no.’”). Indeed, under Tennessee law,<sup>4</sup> a deceased individual cannot be a  
 16 party to a lawsuit. *McCormick v. Illinois Cent. R. Co.*, No. W200800902COAR9CV, 2009  
 17 WL 1392575, at \*7 (Tenn. Ct. App. May 19, 2009) (holding that because the plaintiff “was  
 18 deceased when the complaint was filed on his behalf, the suit was a nullity, and thus not  
 19 amenable to substitution.”).

20       Here, however, the Complaint was filed in Jimmy Phillips’s name, in his individual  
 21 capacity, despite the fact that he had been deceased for over four months. Hence, the  
 22 Complaint is a nullity, which should be dismissed with prejudice. *See Bard IVC Filters Prod.*  
 23 *Liab. Litig.*, 2016 WL 3055112, at \*1.

24  
 25  
 26       <sup>4</sup> This issue is governed by Tennessee substantive law and federal procedural law. *See In re*  
 27 *Donald J. Trump Sec. Litig.*, 7 F.3d 357 (3rd Cir. 1993) (cert. denied); *In re Prudential Ins.*  
 28 *Co. of America Sales Practices Litig.*, 170 F.Supp.2d 1346 (Jud.Pan.Mult.Lit. 2001); *Sadler*  
*v. Pella Corp.*, 2015 WL 7454516 (D. South Carolina Nov. 23, 2015).

1       The Court has already dismissed a case with the same operative facts as a legal nullity.  
 2 On May 31, 2016, the Court dismissed the complaint filed in Pamela Noterman's name,  
 3 which was filed in Florida state court approximately nine months after Ms. Noterman died. In  
 4 so holding, the Court reasoned that “[a] lawsuit filed in the name of a deceased individual is  
 5 . . . a nullity, which presents a jurisdictional defect that cannot be saved by substitution or  
 6 amendment.” *Id.*

7       Similarly, in *McCormick v. Illinois Cent. R. Co.*, the Tennessee Court of Appeals  
 8 addressed the same issue before the Court under controlling law and held that the plaintiff's  
 9 complaint was a legal nullity because it was filed when he was already deceased. *McCormick*,  
 10 2009 WL 1392575. In *McCormick*, the plaintiff died on September 1, 2005, but filed a  
 11 lawsuit about nine months later, on June 8, 2006. *Id.* at \*1. On March 21, 2007, the plaintiff's  
 12 counsel filed a Suggestion of Death with the court, notifying it of the plaintiff's death in  
 13 2005, and attempted to substitute his wife as the party plaintiff. *Id.* The defendant  
 14 subsequently filed a motion to dismiss, which, after some procedural wrangling, the lower  
 15 court denied, allowing the plaintiff to substitute his wife as the party plaintiff. *Id.* at \*1-2. On  
 16 review, the Court of Appeals reversed the lower court's denial of the defendant's motion to  
 17 dismiss and dismissed the case, reasoning that “because Mr. McCormick was deceased when  
 18 the complaint was filed on his behalf, the suit was a nullity, and thus not amenable to  
 19 substitution.” *Id.* at \*7.

20       In addition to the *Noterman* matter and the *McCormick* litigation, numerous state  
 21 courts, and federal courts interpreting various states' laws, have held that cases filed naming  
 22 deceased parties are nullities that must be dismissed with prejudice. *E.g., Banakus v. United*  
 23 *Aircraft Corp.*, 290 F.Supp. 259, 260 (S.D.N.Y.1968) (Since [the plaintiff] was dead when  
 24 the action for personal injuries was commenced, that action must be treated as a nullity” and  
 25 as such, “there were no claims capable of amendment”); *Adelsberger*, 58 Fed.Cl. at 618-19  
 26 (action brought in the name of a deceased individual declared null); *Banks v. Employers'*  
 27 *Liab. Assur. Corp. Ltd., of London, England*, 4 F.R.D. 179, 180 (W.D. Mo. 1944) (in  
 28

1 dismissing suit brought in the name of a deceased individual and stating “[c]learly a suit  
 2 could not be brought in the name of [the plaintiff] after his decease.”); *Pasos v. Eastern S.S.*  
 3 *Co.*, 9 F.R.D. 279 (D. Del. 1949) (“the suit should be dismissed if the court is clearly  
 4 convinced that neither at the institution of the suit or at any time since has there been a legally  
 5 existent party plaintiff and at no time could there have been entered a valid judgment in the  
 6 matter.”); *Garlock Sealing Techs., LLC v. Pittman*, No. 2008-IA-01572-SCT, 2010 WL  
 7 4009151, at \*4 (Miss. Oct. 14, 2010) (holding that a case filed in the name of a deceased  
 8 person was a legal nullity, adding that such an action “has no hope of success and is therefore  
 9 frivolous.”); *Black Canyon Citizens Coalition, Inc. v. Bd. of County Comm’rs of Montrose*  
 10 *County*, 80 P.3d 932, 933–35 (Colo.App.2003) (suit filed in the name of a nonexistent  
 11 corporation deemed void *ab initio*); *Mathews v. Cleveland*, 159 Ga.App. 616, 617, 284 S.E.2d  
 12 634, 636 (1981) (deceased person cannot commence an action); *Levering v. Riverside*  
 13 *Methodist Hosp.*, 2 Ohio App.3d 157, 159, 441 N.E.2d 290, 291 (Ohio App.1981) (complaint  
 14 declared a nullity where plaintiff died prior to its filing); *Gregory v. DiCenzo*, 713 A.2d 772,  
 15 775 (R.I. 1998) (complaint commenced in deceased person’s name deemed a nullity);  
 16 *Williams v. Travelers Property & Casualty of America*, 2007 WL 1299245 (Conn. Super. Ct.  
 17 Apr. 13, 2007).

18 The issue decided in *Noterman*, *McCormick*, and the other cases cited above is  
 19 identical to the issue in the present case. In those cases, the complaints at issue were  
 20 dismissed as nullities because they were brought in the name of a deceased plaintiff. Because  
 21 the Complaint was brought in the name of Jimmy Phillips in his individual capacity, despite  
 22 the fact that he had been deceased for over four months, the Complaint should be void *ab*  
 23 *initio*. Therefore, Bard respectfully requests that the Court dismiss the Complaint with  
 24 prejudice.

25 **IV. CONCLUSION**

26 Because the Complaint named Jimmy Phillips as the plaintiff, despite the fact that he  
 27 was deceased at the time of filing, the Complaint is a nullity. For that reason, Bard  
 28

1 respectfully requests that the Court dismiss the Complaint with prejudice pursuant to Federal  
2 Rule of Civil Procedure 12(b).

3 This 12th day of December, 2019.

4 s/Richard B. North, Jr.  
5 Richard B. North, Jr.

6 Georgia Bar No. 545599

7 Matthew B. Lerner

8 Georgia Bar No. 446986

9 NELSON MULLINS RILEY & SCARBOROUGH LLP

10 Atlantic Station

11 201 17th Street, NW / Suite 1700

12 Atlanta, GA 30363

13 PH: (404) 322-6000

14 FX: (404) 322-6050

15 richard.north@nelsonmullins.com

16 matthew.lerner@nelsonmullins.com

17 James R. Condo (#005867)

18 SNELL & WILMER L.L.P.

19 One Arizona Center

20 400 E. Van Buren

21 Phoenix, AZ 85004-2204

22 PH: (602) 382-6000

23 jcondo@swlaw.com

24 **Attorney for Defendants C. R. Bard, Inc. and**  
25 **Bard Peripheral Vascular, Inc.**

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on December 12, 2019, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send notification of such filing to all counsel of record.

s/Richard B. North, Jr.  
Richard B. North, Jr.  
Georgia Bar No. 545599  
NELSON MULLINS RILEY & SCARBOROUGH LLP  
Atlantic Station  
201 17th Street, NW / Suite 1700  
Atlanta, GA 30363  
PH: (404) 322-6000  
FX: (404) 322-6050  
[richard.north@nelsonmullins.com](mailto:richard.north@nelsonmullins.com)